Supreme Court of the United States

No. 451.

LUCILLE HARVEY, AN UNMARRIED WOMAN,
PETITIONER,

VS.

CITY OF ST. PETERSBURG, A MUNICIPAL CORPORATION, FOR THE USE OF GLENN V. LELAND, AS RECEIVER OF THE CERTIFICATE SINKING FUND OF THE CITY OF ST. PETERSBURG, FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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CHARTER OF CITY OF ST. PETERSBURG

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LUCILLE HARVEY, AN UNMARRIED WOMAN,
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VS.

CITY OF ST. PETERSBURG, A MUNICIPAL CORPORATION, FOR THE USE OF GLENN V. LELAND, AS RECEIVER OF THE CERTIFICATE SINKING FUND OF THE CITY OF ST. PETERSBURG, FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

Lucille Harvey, an unmarried woman, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above case on June 28, 1940, affirming the judgment and decree of the Circuit Court of Pinellas County, Florida, which held that a state court receiver was the proper party to foreclose municipal public improvements liens against the private property of petitioner:

OPINIONS BELOW.

The order and decree of the Pinellas County Circuit Court (R. 62) is not reported. The Supreme Court of the State of Florida has rendered two opinions in this case, one (R. 72) is reported in 189 So. 861, the other (R. 81) is reported in 197 So. 116.

JURISDICTION.

The judgment of the Supreme Court of Florida, excepted to, was entered June 28, 1940 (R. 82). The jurisdiction of this court is invoked under the provisions of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Section 344 (b) of Title 28, United States Code Annotated.

QUESTION PRESENTED.

Can public improvement lien certificates, issued by the City of St. Petersburg, a municipal corporation, be legally foreclosed against real estate by a receiver, appointed by the Circuit Court of Pinellas County, Florida, for the express purpose of foreclosing and collecting said public improvement liens, and can the rightful owner of said lands be legally divested of her title thereto in this manner?

HOW FEDERAL QUESTION RAISED AND CONSIDERED IN THE COURT BELOW.

Respondent, a state court receiver, filed a bill in the Circuit Court of Pinellas County, Florida, to foreclose certain public improvement lien certificates issued by the City of St. Petersburg, against the property of petitioner. Petitioner answered the bill, and incorporated in her answer a motion to dismiss the bill, on the ground (R. 30):

(a) That the appointment of the receiver for the purpose of collecting said certificates was void, and that all subsequent proceedings based thereon were invalid.

The motion to dismiss the bill of complaint was denied in the lower court and this order of the lower court was affirmed by the Supreme Court of Florida, 189 So. 861.

The cause proceeded to trial and final hearing. A final decree was entered by the Circuit Court of Pinellas County, Florida, granting the prayer of the receiver, foreclosing the public improvement liens and ordering petitioner's property sold to satisfy the judgment entered.

An appeal was taken from this final order and decree to the Supreme Court of Florida.

The federal questions here presented were presented to the Supreme Court of Florida by assignments of error No. 1 (R. 67), No. 2 (R. 68), and No. 3 (R. 69). The questions thus presented to the Supreme Court of Florida were decided adversely to the contentions of petitioner, and the decree and judgment of the Circuit Court of Pinellas County, Florida, authorizing the foreclosure of these municipal public improvement liens by the receiver, was affirmed.

The Supreme Court of Florida is the court of last resort of that state.

STATEMENT.

The City of St. Petersburg is a municipal corporation. Petitioner is the owner of certain real estate in this City. Sometime prior to February, 1927, the City caused certain sidewalks to be laid in front of and abutting on petitioner's real estate. On April 5, 1927, the City, to secure the costs of these alleged improvements, issued its public improvement lien certificates against petitioner's property. Similar improvements were placed

in front of and abutting on a large number of other parcels of real estate in said City and similar public improvement lien certificates were issued against these properties. All these certificates were sold by the City to private parties and their payment was guaranteed by the City. The certificates were not paid when they matured (R. 17).

The City entered into an agreement with the holders of these various certificates under the terms of which the City was to issue its general obligation refunding bonds and deliver them to the certificate holders in return for the certificates. The terms of this contract were complied with and the bonds were delivered to the private holders and the City took up its public improvement lien certificates and became again the owner thereof. These certificates were deposited with Glenn V. Leland, the director of finance of the City, for collection (R. 54). At the time of completing this exchange transaction, the City issued and delivered to these private individuals to whom it had delivered its refunding bonds, its delinquent interest certificates, in payment of the interest which had accumulated on the public improvement lien certificates.

The director of finance of the City was directed to proceed with the collection of these public improvement certificates and the proceeds of these collections were to be used to pay the delinquent interest certificates, just described, and to retire the bonds which had been exchanged for the certificates.

About November 9, 1935, the holders of some of these delinquent interest certificates brought a suit in the state circuit court, and asked that a receiver be appointed to take charge of and collect all of these improvement lien certificates which were owned by the City (R. 17). On November 12, 1935, the circuit court appointed as re-

ceiver the same Glenn V. Leland who already held the certificates for the City, as its director of finance, and who was already charged with the duty of collecting them, and as said receiver he was ordered to proceed to collect the same certificates by actions at law or in equity (R. 47).

The jurisdiction alleged for appointing the receiver was that Glenn V. Leland, holding these certificates as director of finance of the City, was a trustee and the court had jurisdiction over trusts; further that he as receiver could perform his duties better (R. 47).

The receiver thus appointed, on June 1, 1938, filed a bill of complaint for the purpose of foreclosing the public improvement lien certificates which had been issued against petitioner's real estate as herein stated (R. 1).

To this bill of complaint an answer was filed by petitioner in which was incorporated a motion to dismiss the bill (R. 30). It was contended in this motion that the appointment of the receiver to make collection of the public improvement lien certificates of the City was void and that the receiver has no legal authority to institute the foreclosure proceeding (R. 35). This motion was denied by the Circuit Court of Pinellas County. The Supreme Court of Florida affirmed this ruling of the circuit court, 189 So. 861.

On petition for certiorari the Supreme Court of the United States declined to disturb this ruling, on the ground that there was no final decree, 84 L. Ed. 95.

The cause then proceeded to final hearing and a final decree was entered, ordering the foreclosure of the liens, and a sale of the real estate covered by said liens to satisfy the judgment therefor.

Appeal was taken from this final decree to the Supreme Court of Florida. The Supreme Court affirmed

the judgment and decree of the lower court (R. 82) 197 So. 116.

The Supreme Court of Florida in announcing the law of this case, on the first appeal, 189 So. 861, stated (R. 76):

> "* * * we are of the opinion that the lower court had jurisdiction to appoint the receiver for the express purpose of collecting by suit the special assessment improvement liens issued by the City of St. Petersburg, and there was no error in its ruling on this question."

The Florida Supreme Court also ruled (R. 80):

> "The decree of the lower court in so far as it denied the motion to strike designated parts of paragraphs six and eight of the answer is accordingly reversed and in all other respects affirmed and the cause remanded for further proceedings not inconsistent with the views herein expressed."

SPECIFICATION OF THE ERRORS TO BE URGED.

Petitioner urges that the Supreme Court of Florida erred:

(1) In holding that a state circuit court had the jurisdiction and authority to appoint a receiver for the express purpose of collecting public improvement lien certificates.

(2) In holding that a receiver appointed by a state circuit court has the right and authority to institute suits for the purpose of collecting municipal public improvement lien certificates.

(3) In affirming the decision of the Circuit Court of Pinellas County, Florida, which ruled that a state court receiver had authority and jurisdiction to proceed

by suit to enforce collection of municipal public improvement lien certificates.

REASONS FOR GRANTING THIS WRIT.

The state court receiver, under the decision of the Supreme Court of Florida, will proceed to sell the lands of petitioner to satisfy the judgment and decree entered by the Circuit Court of Pinellas County, Florida, in favor of the circuit court receiver. As a result of this sale petitioner will be deprived of her property without due process of law and in violation of the provisions of the 14th and 5th Amendments to the Constitution of the United States.

The judgment of the Supreme Court of the State of Florida, now excepted to, is in violation of the organic law of the land and constitutes an encroachment by the judiciary upon those powers of government which are vested exclusively in the legislative department.

This judgment, authorizing a state receiver to collect for a municipality, an obligation of the same nature as a tax, is of such broad interest and is so directly in conflict with the uniform policy of government recognized and enforced in this country, that sufficient reason is presented for granting the writ.

The federal question presented to the Supreme Court of Florida and presented here was not specifically discussed by that court. This federal question was necessarily decided, however, by the Florida Supreme Court, in its final decision and judgment rendered and in its opinions under date of June 16, 1939, and June 28, 1940. Such a decision complies with the requirement of law and gives jurisdiction here.

See *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 82 L. Ed. 751.

Wherefore, petitioner respectfully prays that this petition for writ of certiorari be granted and that the judgment of the Supreme Court of Florida rendered in this cause be reversed.

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Supreme Court of the United States

LUCILLE HARVEY, AN UNMARRIED WOMAN,
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CITY OF ST. PETERSBURG, A MUNICIPAL CORPORATION, FOR THE USE OF GLENN V. LELAND, AS RECEIVER OF THE CERTIFICATE SINKING FUND OF THE CITY OF ST. PETERSBURG, FLORIDA,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Florida to be reviewed in this case was rendered June 28, 1940, and is reported in 197 So., at page 116.

This opinion refers to and adopts as the law of this case a former opinion of the Florida Supreme Court rendered in this case, reported in 189 So. 861.

The judgment and decree of the circuit court is not reported.

GROUNDS OF JURISDICTION INVOKED.

The jurisdiction of this court is invoked under the provisions of Section 237 (b) of the Judicial Code as

amended by the Act of February 13, 1925, Section 344 (b) of Title 28 of United States Code Annotated.

STATEMENT OF THE CASE.

A concise statement of the case is set out in the petition for writ of certiorari (pp. 3-6), which statement is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

A specification of the errors assigned is set out in the petition for certiorari (pp. 6-7) to which this brief is attached, which specification is hereby adopted and made a part hereof.

ARGUMENT.

Glenn V. Leland, a state court receiver, was appointed for the express purpose of foreclosing municipal public improvement liens against petitioner's real estate and other property, and he has secured a final decree of foreclosure and an order to sell petitioner's lands.

Does this procedure deny to petitioner the rights, privileges and immunities, and the protection of her property, guaranteed to her under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, which provide that she shall not be deprived of her property without due process of law.

This question is presented in specification of errors numbers one, two and three (pp. 6-7 of Petition for Certiorari).

Improvement Lien and Tax, Same Type of Obligation.

An assessment by municipality for the costs of public improvement is a tax.

> *Independent School Dist.* v. *Exchange National Company*, 95 A. L. R. 686.
>
> *Philadelphia Mortgage & Trust Company* v. *City of Omaha*, 57 L. R. A. 150.
>
> *City of Roswell* v. *Bateman*, 20 N. M. 77, 146 Pac. 950, L. R. A. 1917D, 365.
>
> *Gray* v. *City of Santa Fe*, (C. C. A. 10th) 89 F. 2d 406.

"A toll is a demand quite different from a special assessment imposed for benefits. The latter is in the nature of a tax and is often called a tax."

> *Day* v. *City of St. Augustine*, 139 So. 885, 104 Fla. 399.

Equity Is Without Power to Appoint a Receiver to Levy and Collect Taxes.

In the case of *State ex rel. Lynch* v. *District Court*, 63 Pac. 2d 333, 113 A. L. R. 746, the court held:

> "The authorities hold without a dissenting voice that equity is without power to appoint a receiver to levy and collect taxes. 1 Jones on Bonds and Bond Securities (4th Ed.), Section 489; 1 Quindry on Bonds and Bondholders, Section 423; *Rees* v. *City of Watertown*, 19 Wall 107, 22 L. Ed. 72; *Meriwether* v. *Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *Thompson* v. *Allen County*, 117 U. S. 550, 29 L. Ed. 472."

Receiver to Collect Taxes Is As Improper As One to Levy Same.

In the case of *Meriwether* v. *Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197, the rule is announced:

> "In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the revenues for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

Respondent recognizes these principles of law but says that the legislature in this case has provided otherwise.

Petitioner presents now, as she did in the lower court, the same section of the charter of the City of St. Petersburg, which respondents rely upon in support of their contention.

Section 108 of the Charter of the City of St. Petersburg, Chapter 6772, Acts of Legislature, 1913, is as follows:

> "In all the cases mentioned in this act where the City of St. Petersburg has acquired, or may hereafter acquire, liens for improvements, such liens, or any of them may be enforced in the following manner by the said City or in the name of said City by the holders; first, by a bill in equity; second, by a suit at law."

Apparently the receiver and the Florida Supreme Court took the position that the receiver is the "holder" of these certificates, and the contention is that the legislature, by this Section 108 of the City Charter, has authorized the procedure taken.

Petitioner urges that this legislative act means that these municipal improvement liens must be collected by the City, if the City owns them; if owned by third parties, they may be collected in the name of the City.

It is not denied that the City owns these public improvement liens.

Facts Briefly Stated.

These are the facts: The City of St. Petersburg issued its public improvement lien certificates. They were brought by private individuals. The City failed to pay them when they matured. The City then issued its general obligation refunding bonds and gave these bonds to the certificate holders and took up the certificates, and thus it became again the owner and holder of these certificates. They were deposited with Glenn V. Leland, the director of finance of the City. This director of finance was charged with the duty of collecting these certificates, and the proceeds were to be used in paying certain delinquent interest certificates which the City had issued and delivered to the former individual owners

of the improvement certificates, to whom it had delivered its general obligation bonds in lieu of said certificates, and to retire these bonds (p. 4 of Petition for Certiorari).

Certain owners of these delinquent interest certificates brought a bill in equity in the state court, seeking the appointment of a receiver to take charge of these improvement lien certificates held by the director of finance for the City. On this bill, a receiver was appointed. He was the same director of finance who already held the certificates for the City, and the order, appointing him, provided that he, as the court's receiver, should take from himself, as trustee, these same certificates and proceed to collect them by actions at law or in equity. This director of finance, then, as receiver, proceeded to foreclose these municipal lien certificates against petitioner's property.

The receiver and the Supreme Court of the State of Florida say that this history shows that the legislative intent, as set out in Section 108 of the charter of the City of St. Petersburg has been complied with, and by reason of that section of the charter, a state court receiver has authority to foreclose these municipal liens, presumably because he holds them.

Petitioner urges the fact that the City of St. Petersburg is the owner of these improvement certificates and that it properly held them by its director of finance, and it and its director of finance were charged with the duty of collecting these certificates; and that there was neither need nor power in the state court to appoint this director of finance as receiver, charged with no other duty except identically the same duties already resting upon him as director of finance of the City to collect these certificates and use the proceeds to pay the delinquent interest certificates and the refunding bonds which had been given for the certificates.

Petitioner says that the City of St. Petersburg is the owner, and although these certificates are now in the physical possession of this state court receiver, that the City, as a matter of fact and law, is still the holder of these certificates.

Petitioner urges that the legislative authority as set out in the city charter, Section 108 thereof, when considered in connection with the facts, does not constitute or come within an exception to the uniformly recognized principle of law hereinabove set out, and that this proceeding by this state court receiver for the purpose of foreclosing municipal improvement liens against petitioner's land is not justified or authorized by the Section 108, of the city charter, is in violation of the due process provisions of the Federal Constitution, and contrary to the organic law of the land.

Due Process of Law.

In *Pennoyer* v. *Neff*, 95 N. S. 734, 24 L. Ed. 572, the court in defining the words "due process of law" says:

> "They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

See:

Kennard v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478.
Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569.
Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552, 12 Am. Jur. 262 *et seq.*

Trusts.

The receiver and the Florida Supreme Court are furthermore seeking to justify their position on the theory that the circuit court was dealing with a trust fund, that

equity has jurisdiction over trusts, and, therefore, has jurisdiction to appoint the receiver for the express purpose of performing the governmental function of collecting taxes (assessments).

Petitioner urges that this theory is a fallacy and without law to support it.

It is insisted that the general equity power which a chancery court has to appoint a receiver and the general proposition that a chancery court has jurisdiction over trusts do not give power or jurisdiction to that court to appoint a receiver for the express purpose of doing a thing which the organic law says that a receiver cannot do, and such appointment is void.

> "Every judgment must contain three jurisdictional elements; namely, jurisdiction of the subject matter; jurisdiction of the person; and the power or authority to render the judgment."
>
> Freeman on Judgments, Vol. I, Sec. 226, p. 444.

In 65 C. J. 332, the rule is announced thus:

> "The right to create an express trust is subordinate to the fundamental principles of equity, and an express trust created in violation of such principles is a nullity. An express trust cannot be created to effect a purpose which is illegal."

In 26 R. C. L. 1206, a similar rule is announced:

> "If the creation of the estate depends on the execution of a void trust, then it can never come into existence."
>
> *In re Fair*, 132 Cal. 523, 60 Pac. 442; 64 Pac. 1000, 84 A. S. R. 70.

In the case of *Byrne Realty Co.* v. *South Florida Farms Co.*, 89 So. 326, 81 Fla. 805, the Florida court says:

"A lawful subject matter and competent parties having appropriate authority in the premises are requisite to the creation of an express trust."

In the case of *Childs* v. *Boots*, 152 So. 214, the court says:

"But a court may have jurisdiction of the parties and of the subject matter of a cause, and still be without jurisdiction to enter in such cause a particular kind of decree which would be wholly unauthorized. This rule is conceded on the authority of *Grace* v. *Hendricks*, 140 So. 790."

In the case of *Dewhurst* v. *Wright*, 10 So. 685, 29 Fla. 223, the Florida Supreme Court says:

"The trouble with complainants' case is that they are asking a court of equity to aid them in something which is contrary to the policy of the law. This a court of equity will not do, but, judging those who pray at its hands relief which the courts of law cannot afford by the case they make for themselves, it will leave them where they are if it appears they are seeking to evade the policy of the law as defined in a public statute (citations)."

In the case of *Rees* v. *City of Watertown*, 86 U. S. 107, 22 L. Ed. 72, this court says:

"A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."

See, also, *Meriwether* v. *Garrett, supra.*

Remedy at Law Complete.

Petitioner urges that when Glenn V. Leland, the director of finance of the City of St. Petersburg, received

these municipal public improvement liens for the purpose of collecting them, it became his duty as an officer of the municipality to obey these instructions. If he failed or refused to perform this duty, the remedy at law was full and complete and no trust theory and no equity jurisdiction was needed.

In *Thompson* v. *Allen County,* 115 U. S. 550, 29 L. Ed. 472, on page 473, the rule is announced:

> "The remedy was by mandamus at law, and 'We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus, * * *' a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgment only where the latter is inadequate to afford the proper remedy.
>
> By inadequacy of the remedy at law is here meant, not that it fails to produce the money (that is a very usual result in the use of all remedies), but that in its nature or character it is not fitted or adapted to the end in view."

See, also:

Rees v. *City of Watertown,* 19 Wall. 107, 22 L. Ed. 72.

Paducah v. *White,* 244 Ky. 733, 51 S. W. 2d 935.

Meriwether v. *Garrett,* 102 U. S. 472, 26 L. Ed. 197.

Petitioner urges that the Supreme Court of Florida committed error when it held and ruled that this receiver has powers and rights and authorities which have never been accorded to any other receiver, and that said ruling is in violation of the constitution and in direct opposition to the uniformly recognized principles of court procedure and organic law.

Appointment of the Receiver Void.

Petitioner urges that although chancery courts have the power to appoint receivers, this power is not broad enough to authorize even a chancery court to do an illegal thing which is contrary to the organic law of the land. When this chancery court attempted to appoint this receiver for the express purpose of performing this governmental function, it exceeded its power and the purported order of appointment for this purpose was void.

> "A judgment that is absolutely null and void—a mere *brutum fulmen*—can be set aside and stricken from the record, on motion, at any time, and may be collaterally assailed; * * *"
>
> *Einstein* v. *Davidson*, 17 So. 563, 35 Fla. 342.

> "If the defect of jurisdiction springs from want of power, the result is void; * * *"
>
> *Malone* v. *Meres*, 109 So. 685, 91 Fla. 709.

See, also:

Rees v. *City of Watertown*, 19 Wall. 107, 22 L. Ed. 72.

Thompson v. *Allen County*, 115 U. S. 550, 29 L. Ed. 472.

Wherefore, petitioner respectfully prays that her prayer for a writ of certiorari be granted.

Respectfully submitted,

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Supreme Court of the United States

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OCTOBER TERM, 1940.

LUCILLE HARVEY, A WIDOW, PETITIONER,

VS.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF RESPONDENT.

OPINION OF THE COURT BELOW.

The decree of the Supreme Court of Florida, which the petition for certiorari asks this court to review, is reported in 197 Southern Reporter, page 116, and by reference adopts as the law of the case a former opinion of the Supreme Court of Florida rendered in this cause and reported in 189 Southern Reporter, page 861.

OBJECTION TO GROUND OF JURISDICTION INVOKED.

The petition for certiorari does not properly present any Federal question for determination by this court.

STATEMENT OF FACTS CORRECTING INACCURACY IN THE STATEMENT OF FACTS BY PETITIONER.

Petitioner has unwittingly presented a statement of facts not in accordance with the record. She says (page 4 of petition):

> "The terms of this contract were complied with and the bonds were delivered to the private holders and the City took up its public improvement lien certificates and became again the owner thereof. These certificates were deposited with Glenn V. Leland, the director of finance of the City, for collection."

The City did not become the owner of the improvement lien certificates under the contract between the City and the private investors who originally purchased the same (Record 54).

The City proposed to the holders of improvement lien certificates to issue refunding general obligation bonds in renewal of the principal of the improvement liens; to place all of the improvement liens, the principal of which was redeemed, in a special sinking fund solely for the purpose of retiring the delinquent interest due upon said certificates on the date of the issuance of refunding bonds and thereafter for the retirement of the refunding bonds. It was provided that said sinking fund should be kept separate and apart from all other funds of the City, and the collections from said certificates so placed in said sinking fund should be used for the payment of the delinquent interest (Record 57-58). The Director of Fi-

nance of the City, and his successors in office, was designated and constituted as trustee for the purpose of carrying out the provisions of the sinking fund thus established (Record 59). It was the duty of the trustee to enforce collections sufficient to pay all of the delinquent interest within six months, failing which it then became his duty to institute suits at law or in equity to collect the same and upon his failure so to do the contract gave the holders of refunding bonds the right to enforce the collection of said improvement liens in the name of the City until the delinquent interest was fully paid (Record 60). This contract gave the holders of refunding bonds no additional right than that which they possessed under the provisions of Section 108, Chapter 6772, Laws, 1913 (Record 76).

It will thus be seen that the City did not become the owner of the improvement liens but on the contrary the trustee became the owner and the holders of refunding bonds had the first lien on the fund thus created.

When the trustee failed to perform his duty the parties beneficially interested filed a bill in equity and had the Circuit Court of Pinellas County, Florida, to appoint a receiver to represent all of the parties (Record 47).

ARGUMENT.

No Federal Question Presented for Consideration.

Petitioner contends that:

> The appointment of a state court receiver for the express purpose of foreclosing municipal improvement liens, and the subsequent foreclosure thereof by the receiver against the real estate of petitioner, deprives her of her property without due process of law.

No other question is presented in the petition or brief of petitioner, as a ground for jurisdiction of this Court.

Receiver May Be Appointed by Court to Collect Improvement Liens When Authorized by Legislature.

Petitioner relies, as authority, upon the case of *State ex rel. Lynch* v. *District Court*, 73 Pac. 2d 333, 113 A. L. R. 746, for the proposition that a court is without jurisdiction to appoint a receiver to collect paving assessments. That court did so hold when such remedy is not one of those provided by statute, but the court, in the opinion, cited the case of *Preston* v. *Sturgis Mill Company*, 183 Fed. 32, 32 L. R. A. 1020, as authority. In the case last cited the court said:

> "The scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the legislature may prescribe * * *. It is not, however, within the scope of this principle that the judiciary shall in no event exercise this power of taxation. Its scope is that it shall not exercise it *unless the legislature shall so provide. If the legislature does so provide, it may exercise to the extent provided*" (Italics supplied).

Florida Supreme Court Construed Section 108, Chapter 6772, Laws of Florida, 1913, As Authorizing Court to Appoint Receiver for Collecting Municipal Improvement Liens.

The Supreme Court of Florida, in the opinion filed on June 16, 1939 (Record 72), construed Section 108, Chapter 6772, Laws of Florida, 1913 (Appendix A) as empowering the courts to appoint receivers for the purpose of collecting municipal improvement liens in a proper case. The Court said (Record 74):

> "It is true, as contended by appellant, that in the absence of legislative authority so to do, a court receiver has no authority whatsoever to enforce the collection of taxes or public improvement assessment liens issued by a municipality * * *.
>
> "However, Section 108, Chapter 6772, Special Acts of 1913, Laws of Florida (Charter of City of St. Petersburg) provides:
>
> > 'In all cases mentioned in this act where the City of St. Petersburg has acquired or may hereafter acquire, liens for improvements, such liens or any of them may be enforced in the following manner by said City or *in the name of said City by the holders;* first by a bill in equity; second, by a suit at law' (Italics supplied).
>
> "The City guaranteed the payment of the certificates involved herein, but did not pay the same upon default. Instead, the City proposed to issue refunding bonds, on a renewal obligation in payment of the principal of the certificates of indebtedness, and to create a trust fund by placing all of the certificates of indebtedness in a common fund which was to be administered by a trustee, and to pay the accrued interest due the holders of said certificates of indebtedness out of the fund thus created. In order to facilitate the operation of the plan, the City issued to the holders of said certificates of indebtedness non-interest bearing delinquent interest certificates evidencing the amount of delinquent interest which each holder of the certificates of indebted-

ness was entitled to receive. The holders of said certificates could not look to the general revenues of the City for the payment of their obligations. There was but one source of payment and that was the trust fund created by the collection of these certificates of indebtedness.

"The law is well settled that courts of equity have jurisdiction to appoint a receiver of trust estates or trust funds" (Record 74-75).

Construction by Highest Court of State of a State Statute Binding on United States Supreme Court.

The validity of state statutes is a question, the decision of which by the highest state court is not open to review in the Federal Supreme Court on writ of error to the state court.

Green v. *Frazier*, 253 U. S. 233, 64 U. S. (L. Ed.) 878 (1).

The Federal Supreme Court, when testing the validity of a state statute, may not give to the statute a significance which the highest court of the state has expressly decided that it does not have.

Orr v. *Allen*, 248 U. S. 35, 63 U. S. (L. Ed.) 109 (1).

The construction by the highest court of a state of a state statute so as to hold that it authorizes the appointment of special collectors, each charged with the duty of collecting only some designated part of assessed county taxes, will be followed by the United States Supreme Court.

Hendrickson v. *Apperson*, 245 U. S. 105, 62 U. S. (L. Ed.) 178 (1).

The construction by the Supreme Court of Florida that Section 108, Chapter 6772, Laws of Florida, 1913, authorizes a court to appoint a receiver to collect special assessment liens is binding on this court, under the decisions cited above and other decisions of this court too numerous to set out in this brief.

Due Process of Law.

Petitioner does not contend that she did not receive notice of the claim asserted nor that she did not have an opportunity afforded her to defend against it. The record is conclusive that she had her day in court. If the lien is a valid lien, petitioner has the right to redeem the same at any time before the sale of her property under foreclosure, whether the foreclosure be by a receiver appointed by the court or by the city in its corporate capacity. If the lien is invalid she can contest the invalidity in the action brought by the receiver, which she did and the adjudication was adverse to her. Her rights were not diminished by the appointment of a receiver with power to foreclose the lien.

The proceedings in a state court, in order to constitute due process of law under United States Constitution, 14th Amendment, need not be by any particular mode, if they constitute a regular course of proceeding in which notice is given of the claim asserted, and an opportunity afforded to defend against it.

Reagan v. *United States*, 182 U. S. 427, 45 U. S. (L. Ed.) 1165 (3).

Federal Question Essential.

It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, that the federal question was actually decided, or that the judgment rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. v. *State of Oklahoma*, 303 U. S. 206 (2), 82 U. S. (L. Ed.) 751 (2).

The respondent contends that the question involved in the petition for certiorari is purely one of procedural law hinging upon the construction of a state statute, which has been construed by the highest court of the State of Florida. In matters of procedural law there can be no denial of due process of law where the defendant has received notice, as a matter of right and not as a matter of grace, has had an opportunity afforded for a hearing and has been heard.

Respondent respectfully submits to the court that the petition for certiorari presents no federal question for the consideration of this court and the petition should therefore be denied.

Respectfully submitted,

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APPENDIX A.

Section 108, Chapter 6772, Laws of Florida, 1913.

Sec. 108. Assessments.—The City of St. Petersburg is hereby authorized to grade, pave, repave, curb, gutter, wall, bridge, gravel, academize, plank, and repair any street or avenue, alley or highway; to grade, improve, protect and ornament any public park, square or grounds; to plant and protect shade or ornamental trees on the streets and avenues; to construct, lay, relay and repair sidewalks, retaining walls, gutters, sewers, and drains, and to build sea-walls, docks, quays, bridges, warehouses, deep water harbors and to drain swamps, marshes, low grounds and to fill in low grounds; and the whole or any part of the expense of such improvement may be defrayed by an assessment upon the real estate benefitted thereby in proportion to such benefits without regard to cash valuation.

The Board of Commissioners of the City of St. Petersburg shall by ordinance create special assessment districts and shall assess against the property within such special district, such amounts as will be necessary to defray the expenses for any improvement above mentioned or it may assess the same against abutting property in proportion to frontage of said property on the improvement. The Board of Commissioners, as soon as assessment is made by ordinance, shall issue certificate of indebtedness for the amounts as assessed, and separate certificates shall be issued against each tract of land assessed containing a description of the land and the amount of the assessment together with the general nature of the improvement for which the assessment is made and the date thereof, which shall constitute and become a prior lien to all other liens, except taxes. The said certificate

shall be payable to owner, or his assignee. Said assignment of certificate must appear upon the certificate itself and also upon the books of the City in order that the assignment shall be legal, and binding. The certificate shall carry interest at a rate not greater than eight per cent per annum, said amount to be fixed by the Board of Commissioners and payable annually from the day of the completion of said work or improvement and acceptance thereof; the payment of the certificates shall run for one, two, three, four and five years, such certificate and annual interest thereon shall be guaranteed by the City of St. Petersburg, Florida, and in case of nonpayment of annual interest or principal at maturity by the property owner, the same shall be redeemed by the City at the option of the *bona fide* holder of said certificate, but such redemption by the City shall not discharge the lien or assessment against the said property. The certificates when issued shall be turned over to the Treasurer of the City, but when ordered to do so by direction of the Board of Commissioners, may sell or dispose of the same and in such manner as may be approved by such resolution in payment of such work or improvement or for cash; provided, however, that the owner of the property against which the assessment is made shall have the option to pay the entire amount of such assessment in cash upon notice of his intention so to do given before 30 days after the completion of work, in which event, the certificates to be issued or lapse of 30 days from completion of work for said assessment shall be redeemed and cancelled.

In all the cases mentioned in this Act where the City of St. Petersburg has acquired or may hereafter acquire, liens for improvements, such liens of any of them may be enforced in the following manner by the said City or in the name of by the holders; first by a bill in equity; second, by a suit at law. The bill in equity or the declaration at law shall state briefly and succinctly the facts

constituting the lien, the amount and the description of the property on which said lien has been acquired and shall contain a prayer that the owner be compelled to pay the amount of said lien or in default thereof that said property shall be sold to satisfy the same. But the judgment or decree obtained in said suit shall not be enforced against or be a lien upon any other property than that against which the assessment was made; that in the decree or judgment as the case may be for the enforcement and collection of the amount for which said lien was given, decree or judgment shall also be rendered for a reasonable attorney's fee not to exceed ten per cent on the amount of the recovery, together with the costs of the proceedings, which attorney's fee and costs shall also become a lien upon said land and shall be collected at the time and in the manner provided for the collection of the amount for which the lien was originally given. But in no event shall the city be liable for the payment of the attorney's fee herein provided for.

In the proceedings provided for in the preceding section the owner or owners of the land if they can be ascertained shall be parties defendant. If the owner or owners cannot be ascertained after diligent inquiry the proceedings shall be against the property on which the lein is claimed without mentioning any party as defendant. In such case service shall be had by a notice of the institution of said suit for the enforcement of such a lien by advertisement in a newspaper published in the City of St. Petersburg once a week for four consecutive weeks, Provided, That if there be no newspaper published in the said City of St. Petersburg then such notice may be published in any newspaper published in said County; Provided, That before such service shall be had the complainant or plaintiff, as the case may be, his agent or attorney shall make affidavit and file with the bill in chancery or the declaration at law setting forth the fact that the owner or owners of such property are unknown

to him. In all proceedings to enforce said liens or any of them, save in cases where the owner or owners cannot be ascertained, service shall be made on the parties defendant in the same manner as is provided by law for service in other cases. In such proceedings appeals and writs of error may be taken to the proper Appellate Courts as in other cases. The Appellate Court shall on a motion of either party advance such cause out of their regular order and try and determine the same as early as possible.